No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1967

THOMAS EARL SIMMONS AND ROBERT JAMES GARRETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (R. 82–87) is reported at 371 F. 2d 296.

JURISDICTION

The judgment of the court of appeals (R. 88) was entered on December 7, 1966. A petition for rehearing (R. 89) was denied on January 23, 1967. The petition for a writ of certiorari was filed on February 21, 1967, and was granted on June 12, 1967 (R. 90; 388 U.S. 906). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 3500 provides in pertinent part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

* * * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

QUESTIONS PRESENTED

1. Whether petitioners' constitutional rights were violated by F.B.I. agents' asking robbery eyewitnesses on several occasions if they found pictures of the robbers among sets of photographs.

2. Whether the trial court erred in failing to direct the production under 18 U.S.C. 3500 of pictures shown to the eyewitnesses.

3. Whether testimony of petitioner Garrett at a hearing on his motion to suppress evidence was properly admitted into evidence at trial.

STATEMENT

Petitioners and William Earl Andrews were convicted after a trial by jury in the United States District Court for the Northern District of Illinois of two counts charging robbery of a federally insured savings and loan association, in violation of 18 U.S.C. 2113. On April 6, 1965, petitioners were sentenced to imprisonment for ten years, petitioner Garrett's term to commence upon completion of a State court sentence being served in Tennessee. The court of appeals affirmed petitioners' convictions, but reversed as to Andrews.

The evidence showed that on February 27, 1964, at approximately 2:00 p.m., two men entered the Ben Franklin Savings and Loan Association in Chicago. One, later identified as Simmons, approached the window where Bernice Parliaman, a teller, was situated, and indicated a desire to purchase a money order. He then pointed a gun at the teller, handed her a blue sack, and ordered her to "stack it" (R. 29).

As Mrs. Parliaman filled the bag, three other tellers became aware that a robbery was taking place. Simmons moved to the window of one of them, Florence Babick, pointed his gun at her, and ordered her to "[s]tay right there or I will shoot you" (R. 16). He cautioned the other bank employees to remain still and to avoid pressing the alarm buzzer, or he would shoot. The second robber, later identified as Garrett, moved to Mrs. Parliaman's window and held his gun on her while she continued to fill the blue sack (R. 27). She emptied her teller's drawer of cash, rolled coin, and coin wrappers, all of which were placed in the cloth bag, which was handed to Garrett (R. 27–28). The robbers then left the bank. After waiting a few moments, a teller, Phillip Mazaika, rushed into the street in time to see Simmons sitting on the passenger side of a white 1960 two-door Thunderbird automobile as it drove away. Mazaika noticed that the car bore a large scrape on the right door, and was quite dirty (R. 7).

Shorty after the robbery, the tellers and another bank employee who had witnessed the robbery were interviewed by F.B.I. agents. A car fitting the description of the getaway vehicle was located and found to be the property of Mrs. Rey, the sister of William Earl Andrews and sister-in-law of petitioner Simmons. She had loaned it to Andrews that afternoon for a short while (R. 3, 4).

Early the same evening, two F.B.I. agents proceeded to the home of Mrs. Mary Mahon, Andrews' mother. The house was situated a half-block from the place where the Thunderbird had been parked (R. 23). After explaining their purpose, the agents re-

quested a photograph of Andrews. Mrs. Mahon replied that she had none (R. 64). She consented to and led the agents in a search of her house. In the basement two suitcases were found. Mrs. Mahon denied any knowledge of the ownership of the suitcases, and could not explain their presence in the basement. She consented to having them opened and removed from the house (R. 64–65). In one suitcase (Gov't Exh. 4) the agents found clothing, a gun holster, a blue sack, several coin cards and bill wrappers bearing the name of the victimized bank or numbers corresponding to account numbers of some of the bank's depositors, and a cigarette carton, on which was stamped "Pulaski, Tennessee" (the home town of both petitioners and Andrews). At trial it was shown that, at a hearing on Garrett's motion to suppress evidence pertaining to the suitcase and its contents, Garrett had identified the clothes found as his, although he could not positively identify the suitcase itself (R. 20, 33–35, 58).

The following morning F.B.I. agents spoke to another of Andrews' sisters, Pat Jones, who lived with Mrs. Mahon. She produced a scrapbook, and removed from it several photographs, which were given to the agents (R. 81). Later that day, the agents returned to the bank. The witnesses to the robbery were called individually to a desk in the lobby of the bank and asked to view a number of photographs. Each identified two or three pictures of Simmons as representing one of the robbers (R. 53, 56, 67, 73, 78). About a week later two of the tellers and the comptroller also identified pictures of Garrett (R. 33, 70–

71, 76).[1] The other tellers indicated that their view of Garrett during the robbery had been obstructed by partitions in the building (R. 9, 17).

Petitioners' motion to suppress Government Exhibit 4—one of the suitcases—and its contents was denied by the district court, because there was insufficient evidence that the search and seizure were "in any way illegal" (R. 24). No opinion was written by the trial court.

Petitioners made essentially the same contentions in the court of appeals as they assert presently, and all were unanimously rejected by the Seventh Circuit. That court concluded that petitioners had not shown that the viewing of pictures by the eyewitnesses improperly led them to identify Simmons as one of the robbers (R. 87). The court noted that the "government witnesses underwent a cross-examination by defense counsel and * * * the record reveals that the weight to be given the identification testimony of the government witnesses was properly entrusted to the jury" (*ibid.*). Petitioners' claim that they were entitled to production of the photographs under 18 U.S.C. 3500 was likewise rejected, the court below stating that: "[t]here is nothing in the Jencks Act which includes a photograph which is not a part of a statement as there defined" (R. 87). As to petitioners' contention that Garrett's Fifth Amendment rights were

[1] Since the number and kind of photographs shown to the witnesses, their reactions to the viewings, etc. are intimately related to the overall fairness of the pretrial identification procedure, a more complete discussion of these matters is included along with the argument on this point (see *infra*, pp. 16–20, 23–24).

violated by the introduction of his testimony in support of the motion to suppress, the court of appeals concluded that "counsel has shown no dilemma, because he has never shown that there was no other way for him to prove Garrett's ownership of the suitcase," and noted that "the fact of ownership of such an object as a suitcase might be proved in numerous ways * * *" (R. 84). "Even if there were no other evidence of ownership available," the court further stated, "Garrett voluntarily testified in support of his motion to suppress and he could not thereafter rely on the fifth amendment to bar consideration by the trier of facts of that testimony" (*ibid.*). Since Garrett's decision to testify in support of the motion to suppress was voluntary and his testimony was given under guidance of counsel, what he actually sought was protection from "the risks of errors of judgment in trial tactics," the court concluded (R. 85). Finally, the court of appeals stated that the search and seizure which produced the suitcase were not improper, since the evidence showed that they had been at least impliedly consented to by Mrs. Mahon, the owner of the house in the basement of which the suitcase was found (R. 85–86).[2]

SUMMARY OF ARGUMENT

I

A review of the "totality of the circumstances" surrounding the investigative techniques employed by the

[2] Pointing out that none of the eyewitnesses identified Andrews, the court of appeals found "no sufficient evidence to justify [his] conviction * * * as an aider and abettor of the alleged robbery" (R. 86), and reversed his conviction (R. 87, 88).

F.B.I. agents, as adduced by defense counsel, fails to support petitioners' contention that the eyewitnesses' identifications of petitioner Simmons were improperly induced. No lineup was used here; nor could any absence of counsel claim properly be made. The government relied solely upon the positive in-court identifications of Simmons by the eyewitnesses. The pictures used to obtain the earlier extrajudicial identifications were sufficient in number to ensure a fair and unbiased identification procedure. They were shown to the eyewitnesses in separate interviews; all but one (which was not identified as of Simmons) were the same size, and Simmons was not featured in such a manner as to attract the attention of the viewer and induce him to make an unreliable identification. At all events, imperfections in the investigative procedure, if any, would affect the weight, but not the admissibility, of the courtroom identifications. No denial of due process resulted from the identification procedure here involved.

II

In the circumstances of this case, the photographs shown to the eyewitnesses were not producible pursuant to 18 U.S.C. 3500. Congress did not intend that photographs, at least as a general rule, could be required to be produced under the Jencks Act. Both the text of the statute and its legislative history are quite clear on this point. Nor were the pictures sought here an integral part of any government witness's written statement. Thus, it remained for the trial court, in its discretion, to determine whether the pictures should be produced. In view of the delay which an order for

production would have caused, as well as the lengthy cross-examination conducted by defense counsel and the fact that the government witnesses' in-court identifications were unequivocal, the trial court did not abuse its discretion in declining to order production of the photographs shown to these witnesses.

III

Petitioner Garrett was not "compelled" to waive his privilege against self-incrimination in order to assert his rights under the Fourth Amendment. His voluntary decision to testify in support of his motion to suppress was a tactical choice, made upon advice of counsel and with knowledge that the suitcase in which his clothes were discovered was found in a house in which he had no interest, and whose owner, Mrs. Mahon, had never met or seen him. He knew, too, that the search was not directed toward him, and had at least implicitly been consented to by Mrs. Mahon. Yet, for his own purposes, Garrett sought to take advantage of what he claimed to be an illegal invasion of Mrs. Mahon's privacy by asserting that the clothes inside the suitcase were his. If his motion had succeeded, his testimony in support of his standing to object, as well as the suitcase and its contents, would probably have been inadmissible. Accordingly, Garrett stood to gain and assumed a known risk in seeking to suppress the suitcase, but nothing compelled him to do so. Thus, the testimony offered by Garrett in his unsuccessful attempt to have the suitcase excluded was properly admitted in evidence at trial,

if sufficiently independent of the earlier lineup identification.

Moreover, in *Stovall* the Court determined that the holding of *Wade* and *Gilbert* would not be applied retroactively. Thus, since petitioners were tried and convicted prior to June 12, 1967, no claim could be made that *Wade* and *Gilbert* applied even if a lineup identification had been involved. *A fortiori,* those decisions are inapplicable to earlier identifications not involving a lineup.[3]

Indeed, petitioners make no Sixth Amendment contention here. Rather, they apparently rely on the Due Process Clause, and ground that reliance on certain language in this Court's opinion in *Stovall.* There, independent of the issue regarding absence of counsel, a claim was made that a confrontation conducted at the hospital bed of the only living eyewitness was "so unnecessarily suggestive and conducive to irreparable mistaken identification" as seriously to impair the validity of the identification testimony at trial (388 U.S. at 302). Citing *Palmer* v. *Peyton,* 359 F. 2d 199 (C.A. 4), the Court noted that a complaint charging

[3] In view of the Court's repeated references in the *Wade* opinion to the compelled "confrontation" between the accused and witnesses at a lineup (*e.g.*, 388 U.S. at 226–230), it seems clear that extrajudicial identification procedures which do not involve such a confrontation are not controlled by the *Wade* and *Gilbert* decisions, insofar as the right to representation by counsel is concerned. Indeed, in discussing the factors to be considered in determining whether the taint of a lineup identification without counsel had been sufficiently purged to permit the introduction of identification testimony at trial, the Court in *Wade* approvingly referred to "the identification by picture of the defendant prior to the lineup * * *" (388 U.S. at 241).

an unduly suggestive extrajudicial confrontation procedure was "a recognized ground of attack upon a conviction independent of any right to counsel claim," and raises an issue of due process of law (*ibid.*). Resolution of a claimed due process violation "in the conduct of a confrontation," it was said, "depends on the totality of the circumstances surrounding it * * *" (*ibid.*). The Court then concluded that there was no violation of due process under the circumstances there presented.

In this case, no pretrial identification by viewing petitioners in person was ever made. Unlike *Stovall*, there was no "confrontation" between accused and witness; here the eyewitnesses testified that they did not see petitioners in person from the day of the robbery to the day of trial. Nevertheless, because the witnesses had given detailed descriptions of the robbers to the F.B.I.,[4] and had identified their pictures on several occasions—the first time as to Simmons on the day following the robbery—petitioners contend that the extrajudicial identification procedure used by the F.B.I. unduly focused the attention of the eyewitnesses upon Simmons,[5] and thereby inevitably resulted in their identification of him at trial as one of the robbers.[6] Accordingly, it seems appropriate to

[4] Statements containing these descriptions were produced at trial and turned over to defense counsel pursuant to 18 U.S.C. 3500.

[5] Petitioners do not urge that the allegation of unlawful pretrial identification extends to Garrett (see Pet. 8–10 and Pet. Br. 10–13).

[6] *Palmer* v. *Peyton*, 359 F. 2d 199 (C.A. 4), relied on by petitioners (Pet. Br. 10), involved a factual situation far differ-

review the "totality of the circumstances" surrounding the pretrial identification procedure.

1. THE OPPORTUNITY FOR OBSERVATION AT THE TIME OF THE ROBBERY

The bank robbery occurred in the early afternoon on a clear day in a well-lighted bank. The robbers were not masked and made no attempt whatever to disguise their appearance. The robber subsequently identified as Simmons [7] was seen at close range by five persons. These circumstances strongly suggest that the eyewitnesses were in a position to make a reliable, positive and unmistakable identification of Simmons.

2. EVENTS IMMEDIATELY FOLLOWING THE ROBBERY

The testimony of the F.B.I. agents makes it quite clear that at the beginning of their investigation the

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ent from that presented here. There the identification of the alleged assailant by the victim was based almost solely on her hearing of his voice; no confrontation or actual viewing occurred, no lineup was conducted, and the victim was not even given the opportunity to hear other voices (see *id.* at 200–202). It can hardly be cogently maintained that the finding of a denial of due process in such circumstances supports such a conclusion here.

[7] In support of their claim that the F.B.I. agents influenced the witnesses to identify Simmons, petitioners cite a purported statement by the witness Mazaika that the robber he identified as Simmons spoke with a "Tennessee accent" (Pet. Br. 12). The evidence shows, however, that Mazaika described Simmons as having a "southern accent" (R. 6). On cross-examination, when the witness was asked whether he could identify a Tennessee accent, government counsel interposed an objection, noting that Mazaika did not describe Simmons as having a "Tennessee accent" (R. 9–10). Another eyewitness, Mrs. Parliaman, testified at trial that the robber she identified as Simmons had a pronounced southern accent (Tr. 316).

prime suspect was neither of the petitioners, but rather their co-defendant Andrews.[8] After interviewing the witnesses at the bank, the agents set out in search of the getaway car. This led them to the home of Andrews' mother, Mrs. Mahon. At the hearing on Garrett's motion to suppress, Agent Huntington described his discussion with Mrs. Mahon at her house (R. 63–64):

> A. We explained our purpose for being there, that there had been a robbery committed at the Ben Franklin Savings & Loan Association, and we had reason to believe that Earl Andrews may have been a participant, and we asked general questions relative to Andrews' size, weight, what he looked like, asked if she had a photograph of him.
>
> Q. What did she say?
>
> A. She said that she did not.
>
> Q. All right. After that, did you have a further conversation with her?
>
> A. Yes, sir. After having been in there for quite some time, we asked her if we could look around, because of the possibility—because the possibility existed that Earl Andrews may be in the house at that moment.

On cross-examination by counsel for Garrett, the agent was asked what time it was when he had concluded that Andrews was a suspect. He replied (R. 65):

> A. Well, contemporaneous with the time that we entered the house, 5:15; this was only a half

[8] Simmons' counsel acknowledged this in closing argument (Tr. 586).

block, you see, from where the automobile was found. So this is just instantaneously.

The discovery at Mrs. Mahon's home of items connected to the robbery fortified the agents' belief that Andrews had been involved in the offense. Thus, on the following day, when they interviewed his sister, Pat Jones, they requested pictures of Andrews (R. 81). In addition, the agents obtained a coat which they had reason to believe belonged to Andrews (R. 43). It was at that time that they received information causing the agents to suspect that Andrews' brother-in-law, petitioner Simmons, might have been involved in the felony (R. 44). Accordingly, the agents sought and secured pictures of him as well.

The F.B.I. agents obtained at least six snapshots from Mrs. Jones. They consisted mostly of group pictures of Simmons, Andrews and others. Later that day they displayed the photographs to each of the eyewitnesses, in separate interviews. All but one of the snapshots were the same size, and that one, larger than the others, was not identified as a picture of Simmons (R. 11, 52–53). Although Andrews was prominently featured in the collection of pictures, not one of the witnesses identified him. Of the pictures shown to the witnesses, Mazaika identified two of Simmons (R. 53), Mrs. Babick and Miss Dziedzic selected "two or three" of Simmons,[9] and Mrs. Parlia-

[9] Witness Babick could not recall the number of pictures shown to her more definitely than that these were "lots of them" (R. 55). Another witness, Bialek, testified that at her first viewing she saw "fifty or more" pictures (R. 68–69).

man chose three, including one which resembled Simmons more than the others (R. 73).

3. SUBSEQUENT CONTACTS BETWEEN FEDERAL AGENTS AND EYEWITNESSES

It is beyond dispute that the government relied and intended to rely solely upon in-court identifications of petitioners made by the eyewitnesses at trial. All testimony regarding the extrajudicial identifications was adduced during cross-examination of these witnesses by defense counsel in an effort to establish his claim of a violation of due process. Witnesses Mazaika and Babick were not asked by defense counsel whether they had seen pictures on any occasion after February 28, the date following the robbery. In fact, they were not interviewed by the F.B.I. after that date. Mrs. Bialek testified that she viewed pictures several times (R. 70). She was not asked the number of pictures seen on occasions subsequent to the first viewing, when, she stated, she had been shown more than fifty photographs. The witness did indicate that she was able to identify pictures of both petitioners at the subsequent viewing (R. 70–71). She could not recall the last time she had been shown pictures, except that it had been the previous year.[10] Mrs. Parliaman stated that she was shown pictures on three occasions: the day following the interview, a week thereafter, and when subpoenaed (R. 29, 75). On the last occasion, at a pretrial conference with the Assistant United States Attorney, she was shown about seven pictures, which,

[10] Trial was held in February 1965.

at trial, she identified as being of Simmons, Garrett, and Andrews. She was also asked to review the statement she had given at the time of the robbery (R. 76). At the viewing a week after the robbery, she had been shown twenty pictures (R. 30), from which she identified one of Garrett. Witness Dziedzic was shown pictures twice after the first interview: three weeks after the robbery, when the number of pictures shown to her was increased (R. 80), and shortly before trial, when the prosecuting attorney displayed four pictures, of which two were of Simmons and none was of Garrett (R. 32).

On the day of trial, several of the witnesses recognized Simmons in the courtroom building prior to the commencement of trial (R. 8, 16, 18, 25). One of the witnesses rejected a suggestion by the defense counsel on cross-examination that the prosecuting attorney had pointed him out by saying, "There is one of the guys" (R. 16).

The preceding summary negates the claim that Simmons' right to due process was violated by the procedures used by the F.B.I. agents or the government attorney to obtain identifications of the robbers. Initially, the agents obtained verbal descriptions of the culprits; they had, at the time, no pictures to display. The day following the robbery, when pictures were first shown to the eyewitnesses, no discussions were conducted. The witnesses were not informed of any progress made during the course of the investigation. While the exact number of pictures shown does not clearly appear from the record, it does appear that

at least six were shown at each viewing.[11] The witnesses were not together when shown the pictures; the arrangement and display did not suggest that the pictures of Simmons should be chosen; and the photographs were, at least primarily, group pictures which depicted more than one individual. The testimony of the eyewitnesses does not support any contention that they were coached into identifying Simmons. All of the witnesses positively identified Simmons as one of the robbers, although interviewed individually. Their ability to recognize him, which was fairly and adequately tested, was the result of their excellent opportunity to observe him during the robbery.

On the subsequent occasion when pictures were shown to some of the witnesses by the agents, the number displayed was materially increased, and the witnesses were still told nothing of the progress made by the F.B.I. in its investigation (R. 74).[12] Fewer pictures were available at the later showing of photographs to some—but not all—of the eyewitnesses at

[11] Wall, *Eye-Witness Identification in Criminal Cases* 77 (1965), comments: "How many photographs should be included in the group which is shown to the witness? In England, the usual number is eight or ten, and this number may be the minimum required by police regulations. English judges have been known to comment unfavorably, when summing up to the jury, upon the showing of merely six. In Paris, the number shown ranges from fifteen to twenty. Obviously there is no magic number here, but the number should be large enough to present a fair test of the witness's ability to make an identification."

[12] The viewing of pictures subsequent to the first display apparently coincided with the arrest of Garrett in Tennessee approximately one week after the robbery on March 6, 1964. Garrett was detained in a Nashville prison.

pretrial conferences. In light of their prior positive identifications of Simmons, however, neither the manner nor time of this viewing was improper. This seems clearly so since these witnesses had at a much earlier point positively identified Simmons, under wholly proper conditions, as one of the robbers. Thus, this later viewing by several of the witnesses could in no significant way have affected the propriety of the whole procedure. Rather, it was of the same character as the review with a witness of a statement made at an earlier time or other similar steps taken by counsel in preparing a witness for trial. Moreover, this later procedure, like the previous viewings, did not focus the attention of the witnesses improperly upon Simmons alone.

Recently, several commentators have outlined the possible evils emanating from an improper application by criminal investigators of methods used to obtain an identification of an accused. See, *e.g.*, Fogelson, *Control of Procedures for Identifying a Suspect*, 12 J.For. Sci. 135 (1967); Note, *Due Process in Extra-Judicial Identifications*, 24 Wash. & Lee L.R. 107 (1967); Wall, *Eye-Witness Identification in Criminal Cases* (1965). The latter writer, cited extensively by this Court in the *Wade* opinion (*e.g.*, 388 U.S. at 228–230, 232) has listed a number of "danger signals" which, he believes, increase the probability of a mistaken identification (Wall, *supra*, 90–130). They are:

1. The witness originally stated that he would be unable to identify anyone.

2. The identifying witness knew the defendant prior to the crime, but made no accusa-

tion against him when questioned by the police.

3. A serious discrepancy exists between the identifying witness's original description of the perpetrator of the crime and the actual description of the defendant.

4. Before identifying the defendant at the trial, the witness erroneously identified some other person.

5. Other witnesses to the crime fail to identify the defendant.

6. Prior to trial, the witness sees the defendant but fails to identify him.

7. Before the crime was committed, the witness had a very limited opportunity to see the defendant.

8. The witness and the person identified are of different racial groups.

9. During his original observation of the perpetrator of the crime, the witness was unaware that a crime situation was involved.

10. A considerable period of time elapsed between the witness's view of the criminal and his identification of the defendant.

11. The crime was committed by a number of persons.

12. The witness fails to make a positive identification.

None of these factors, except No. 7, was present in the instant case. And, as to opportunity to observe, while the witnesses saw the robbers for only a few minutes, their unmarred view of Simmons at the time of the robbery and their identification before time dulled their memory eliminates this factor as a potential danger.

In sum, the investigative procedures used by the F.B.I. to obtain an identification of Simmons were plainly consonant with due process of law. Pictures of suspects were shown to the eyewitnesses as soon as possible after the robbery.[13] There is no indication that any of the pictures contained any notations or suggestive poses that would direct the viewer's attention to it, and cause him to select it without relying upon the memory of his personal observation of the suspect. Cf. *Barnes* v. *United States,* 365 F. 2d 509 (C.A.D.C.). The record refutes petitioners' contention that the F.B.I. affirmatively suggested that any eyewitness identify a particular picture of Simmons. The subsequent attempts to assure that proper identification of both petitioners had been made in no way unfairly focused the attention of the eyewitnesses upon Simmons. A thorough cross-examination of the eyewitnesses was conducted by defense counsel. As pointed out by the court of appeals (R. 87), in such a situation "the weight to be given the identification testimony of the government witnesses was properly entrusted to the jury." Considering all the circumstances, the combined identification testimony of all five witnesses, including their ability to identify characteristics other than mere facial features, was plainly sufficient to ensure that petitioners were properly identified as the bank robbers. Thus, there was no violation of petitioners' Fifth Amendment right to due process.

[13] "Interests of the accused and society alike demand that this opportunity be afforded at the earliest possible moment." *United States ex rel. Stovall* v. *Denno*, 355 F. 2d 731, 736 (C.A. 2), affirmed, 388 U.S. 293.

II. THE TRIAL COURT PROPERLY RULED THAT THE PHOTOGRAPHS WERE NOT REQUIRED TO BE PRODUCED UNDER 18 U.S.C. 3500

At the conclusion of the direct examination of the first eyewitness, Mazaika, government counsel turned over a three-page statement obtained from the witness on the day of the robbery, pursuant to 18 U.S.C. 3500, the so-called Jencks Act. On cross-examination, Mazaika stated that the day following the robbery he had identified Simmons from photographs furnished by the F.B.I. agents, indicating that he had been shown approximately six snapshots, some depicting more than one individual, and had selected one or two of petitioner Simmons (R. 52–53). Defense counsel then requested production of the photographs "under 3500" (R. 53). Government counsel interposed no objection, but submitted that the photographs did not qualify as "statements" producible under the statute. He indicated that there existed a "multitude" of photographs, and that he had sent a special agent to attempt to secure them, but that they might not be able to identify the particular photographs which had been shown to the witness (R. 54). The trial judge, after examining the written statement, concluded that the photographs were not an integral part of that statement and that the government was not required to produce them. Accordingly, the court ruled that he would not delay the trial until the pictures were obtained, and ordered defense counsel to continue his cross-examination. At the end of the cross-examination, counsel once more moved for the production of the pictures. The court denied the motion (R. 54).

The next witness, Mrs. Babick, testified on cross-examination [14] that sometime after the robbery she had been shown "lots of" pictures, of which two or three depicted petitioner Simmons (R. 55–56). A request for the production of these pictures "pursuant to 3500" was denied (R. 56–57). A third eyewitness, Mrs. Bialek, told defense counsel that government agents showed pictures to her "several times" (R. 70). The first occasion, on the day after the robbery, she viewed fifty or more (R. 68–69). Counsel's request for the production of all these pictures was denied, the court then indicating that its ruling would apply to all such pictures and that it was unnecessary to repeat the motion (R. 71). The next witness, Mrs. Parliaman, testified that she saw some snapshots on February 28, ten to twenty pictures a week later (when she identified one of Garrett), and about seven photographs shortly before trial (R. 29–30, 73–76). The final witness, Miss Dziedzic, declared that she saw five or six photographs the first time, an indeterminate number approximately three weeks later, and about four shortly before trial (R. 78–80). Petitioners contend that the trial court's ruling denying production of all these photographs constituted reversible error.

A. NEITHER THE EXPRESS LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE JENCKS ACT SUPPORTS THE CONTENTION THAT IT WAS INTENDED TO REQUIRE THE PRODUCTION OF PHOTOGRAPHS

Both the express language and the legislative history of 18 U.S.C. 3500 make it clear that Congress,

[14] Jencks Act statements of this witness and other eyewitnesses who were questioned about viewing pictures were produced prior to the commencement of cross-examination (R. 54).

in response to this Court's holding in *Jencks* v. *United States,* 353 U.S. 657, promulgated a federal rule of criminal procedure to govern the future application of the *Jencks* principle. Exclusive standards were established for determining whether a "statement" or "report" of a government witness to an agent, in possession of the United States, must be produced for use in impeaching the witness on cross-examination. *Palermo* v. *United States,* 360 U.S. 343.

The term "statement" is defined in 18 U.S.C. 3500 as (1) a written statement signed or otherwise adopted or approved by the witness, or (2) a substantially verbatim recital of an oral communication of the witness recorded contemporaneously with the making of the oral statement (see *supra,* p. 2). Photographs do not fall within either category. *Ahlstedt* v. *United States,* 325 F. 2d 257, 258–259 (C.A. 5), certiorari denied, 377 U.S. 968. As stated in *United States* v. *Zurita,* 369 F. 2d 474, 477 (C.A. 7), certiorari denied, 386 U.S. 1023, "A picture may be worth a thousand words, but it does not record those words or reproduce them or, indeed, even indicate what they are." Apart from the fact that photographs are not writings, they do not originate with the witness and are not ordinarily his communications.[15] While it is possible to conceive of a situation in which a photograph may be so interrelated with a statement as to be an indispensable part of it, the trial court specifically found that that was not the case here when it reviewed the

[15] In *Palermo* v. *United States, supra,* in discussing the legislative purpose underlying the enactment of 18 U.S.C. 3500, the Court pointed out that "Congress was concerned that only those

written statements which the government turned over to defense counsel.[16] Indeed, the statements of the eye-witnesses were taken the day of the robbery, before any pictures were even available for viewing by them.[17]

The legislative history provides convincing support for the conclusion that photographs and pictures are not *per se* producible under the Jencks Act. After the conference committee of the House and Senate had agreed upon the wording of the statute, Senator O'Mahoney, the floor manager in the Senate, presented this version for approval. A discussion commenced concerning the scope of the "records" which the statute would order to be produced. The following ensued (103 Cong. Rec. 16489):

> Mr. KEFAUVER. Let me inquire of the chairman of the subcommittee and the chairman of the conference committee whether the word "records" includes photostats of documents and pictures, all of which are very important

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statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment" (360 U.S. at 352). Reflecting this approach in determining the reach of that statutory provision, the Fifth Circuit concluded in *Ahlstedt* that the Jencks Act "does not apply to miscellaneous photographs," and does "not require the production of the entire investigative files" (325 F. 2d at 259).

[16] Petitioners' statement "that the witnesses incorporated the pictures by reference in their statements" (Pet. Br. 14) is not supported by the record and squarely conflicts with the trial court's determination that the pictures were "no part" of the witnesses' statements (R. 54).

[17] No pictures were displayed until February 28, the day after the offense was committed. Contrary to petitioners' assertion (Pet. Br. 14), the pictures could not have been used to obtain statements from the witnesses since no pictures were then available.

in the presentation of a criminal case, and just where they fall within this definition?

Mr. O'MAHONEY. We are not dealing with records in the sense of the question asked by the Senator from Tennessee. We are dealing only with records which are included in the definition here, statements by the witness, which have been approved by him or signed by him or otherwise approved by him, and then oral statements which have been recorded—oral statements made by the witness to an agent of the Government. This is tied directly to statements made by a Government witness to an agent of the Government after the witness has testified, and not to any other records of the FBI or of any other Government bureau.

In light, then, of the plain language of the statute, confirmed by the legislative history, it is clear that the Jencks Act does not, as a general matter, require the production of photographs shown to witnesses by the government. What authority exists on the question supports the court of appeals' view that the Jencks Act does not extend to "a photograph which is not part of a statement as there defined" (R. 87). Thus, the courts below properly concluded that petitioners were not entitled to the pictures sought under 18 U.S.C. 3500.

B. THE TRIAL COURT'S FAILURE TO ORDER PRODUCTION OF THE PHOTOGRAPHS DID NOT, UNDER THE CIRCUMSTANCES, CONSTITUTE AN ABUSE OF DISCRETION

Of course, although pictures do not fall within the literal language of 18 U.S.C. 3500, the trial court

nevertheless had discretion to order their production under *Goldman* v. *United States,* 316 U.S. 129, 132.[18] In the circumstances of this case, however, we do not believe the failure to direct production can be deemed an abuse of discretion. In presenting its case, the government relied upon the positive courtroom identifications of Simmons and Garrett by eyewitnesses to the robbery, and did not bring out the fact that the witnesses had earlier identified photographs of petitioners. Thus, there was no reason for government counsel to have had the numerous photographs shown to the witnesses at various times—some a year earlier—ready for production at trial. Manifestly, he had no intention of using them as part of the government's case, and considered their role in the identification of petitioners a minor one, although he indicated his willingness to attempt to locate the pictures and provide them to petitioners' counsel (R. 54).

Most of the pictures shown to the witnesses were, of course, not identified as portraying either of the petitioners. In the normal course of investigative procedure, these pictures would have been returned to their source, generally a central file, from which they could be secured by other investigators for use if circumstances so required. It is thus doubtful whether all the photographs shown to the witnesses could have

[18] It should be noted that petitioners never phrased their request for production except in Jencks Act terms, and make no abuse of discretion argument in their brief in this Court. Rather, petitioners' contention is that production was required under 18 U.S.C. 3500 because of the relationship between the witnesses' statements and the pictures they were shown (see Pet. Br. 13–15).

been located and accurately identified by the government. Of course, the removal of every picture which might have been shown to the five eyewitnesses from the police files for the extensive period of time between their use and the trial (and, perhaps, until the appellate review had been completed), in anticipation that defense counsel might request their production at trial, would ensure their availability. Such a requirement would, however, seem unnecessarily disruptive of the orderly functioning of law-enforcement activities. Indeed, a rule which would require the keeping of all photographs shown to witnesses in special files pending completion of each and every criminal proceeding would be quite cumbersome and might significantly impair efficient criminal investigation. This seems so especially where, as here, the number of pictures shown was large and they were not essential for establishing the identity of the defendants at trial. The required production of all the photographs shown to the witnesses would, under these circumstances, merely have brought the trial to a needless standstill and injected collateral issues of no import to the real issue of guilt or innocence.

In the instant situation it was the defense which first brought the matter of photographs into the case by its cross-examination of the eyewitnesses. Although defense counsel conducted lengthy interrogations of these individuals, the testimony so elicited, far from negating the ability of the witnesses to identify petitioners, showed that they were able without difficulty to identify the robbers they had observed from the pictures, and could and did pick them out from group

photographs containing others.[19] In these circumstances, the trial court could properly determine that the defense had shown no such need for the photographs as would warrant delaying the trial until they could be located, identified and produced. Indeed, the in-court identifications here were so strong and conclusive that, even if the failure of the court to order production could be deemed error, petitioners can show no prejudice from the absence of the photographs.

III. THE TESTIMONY OF PETITIONER GARRETT AT A HEARING ON HIS MOTION TO SUPPRESS WAS PROPERLY ADMITTED INTO EVIDENCE AT TRIAL

1. Initially, it is important to detail the factual circumstances out of which this particular contention of petitioners arises. On the second day of trial (not prior to trial, as ordinarily contemplated by Rule 41(e), F.R. Crim. P.), petitioner Garrett filed a motion to suppress and return Government Exhibit 4, a suitcase—one of the two seized by the agents at Mrs. Mahon's house—and its contents.[20] The court ruled that it would hear the motion when the government was about to introduce evidence pertaining to it (Tr.

[19] Had the witnesses in fact been coached or otherwise influenced in viewing the pictures, it seems strange that none of them identified Andrews—whom none had actually observed but whose picture appeared frequently in the photographs they viewed (see R. 71). This confirms not only the propriety of the identifications of the two petitioners, but also that the pictures would have been of little if any assistance to them in cross-examining these eyewitnesses.

[20] The other suitcase seized (Gov't Exh. 3) was not admitted into evidence since it was not adequately connected up or shown to be relevant (see R. 37).

74–75). That afternoon, as a government witness was about to testify that she had seen Garrett with a blue cloth container (similar to one found in Gov't Exh. 4) into which the stolen money was put, the jury was excused. The court asked Garrett's counsel whether he intended to have the movant testify in connection with the motion. Counsel replied, "Only to identify the property that has been—the property that will be discussed". (Tr. 177). Garrett then testified that he arrived in Chicago on the morning of February 27 (the day of the robbery) and placed his suitcase in the basement of Mrs. Mahon's house; that he left the house and returned in the late afternoon; and that he thereafter departed, leaving his suitcase behind. Garrett did not return to the house, and left Chicago the next day (Tr. 186–200). When shown Government Exhibit 4, Garrett said he was not sure that this was the suitcase he had placed in Mrs. Mahon's basement. He identified only the clothes in the suitcase as his (R. 20, 58). Mrs. Mahon, testifying in Garrett's behalf, said that she asked the agents not to take the suitcases, but that they did (R. 60). On cross-examination she said she had never seen anyone bring the suitcases into the house, did not know to whom they belonged, and had never given anyone permission to put them there (R. 61).

The agents testified that they told Mrs. Mahon that they believed her son Andrews was involved in the robbery, and that she consented to the search and took them to the basement of the house. When they found the suitcases, Mrs. Mahon said she did not know to whom they belonged. She consented to the agents'

opening the suitcases. When the agents discovered the money they asked Mrs. Mahon if they could take the suitcases, and she said, "Yes, you can. They don't belong to me" (R. 65).

The court, after hearing all the evidence on the motion to suppress, denied it. At the end of the day, after the jury had been excused, government counsel asked whether Garrett's counsel, Mr. Ginsberg, would consider stipulating that his client had identified the clothing found in Government Exhibit 4 as belonging to him. The following day, when it became apparent that counsel would not enter into such a stipulation, government counsel announced his intention to call the court reporter as a witness. Over defense counsel's objection the reporter testified before the jury that, at the hearing on the motion to suppress, Garrett had identified the clothes in the suitcase as his, and had stated that he had put a suitcase in the asement of Mrs. Mahon's house on the day of the offense (Tr. 386–399; R. 33–35). The court instructed the jury that this evidence was received only as to Garrett, and was not to be considered insofar as the other defendants were concerned (R. 35).

2. Petitioner Garrett's contention that, in order to assert his Fourth Amendment right to suppress illegally seized evidence, he was "compelled" to waive his Fifth Amendment right not to take the stand or incriminate himself, must be judged in the light of all of the underlying facts. It is clear, as Garrett obviously knew, that, at the time the search was made, no possible right of privacy relating to him appeared to be involved. He had no proprietary interest in the

premises involved. Mrs. Mahon, who testified in his behalf in support of the motion to suppress, stated that she had never seen him before and had given no one permission to leave a suitcase in her basement (R. 61). Had she or anyone with authority given him permission, such person could have established Garrett's interest in the premises, without his taking the stand. There was nothing on the outside of the suitcase that would identify it as Garrett's. It could not even be said that the "search" was directed at Garrett, for the evidence is clear that the F.B.I. agents at the time regarded Andrews as the only person implicated in the robbery, by reason of the discovery of the getaway car.[21] In relation to Garrett's right of privacy, the suitcase was in no different position from one found abandoned on the road.[22]

In these circumstances, Garrett, for his own purposes, sought to take advantage of what he claimed to be an illegal invasion of the privacy of Mrs. Mahon by asserting that the clothes inside the suitcase belonged to him, on the theory that they were excludable since seized in violation of the Fourth Amendment. By so doing, he presumably hoped to keep out of the

[21] Indeed, the agents asked Mrs. Mahon for pictures of Andrews, and were concerned that he might then be in the house (see *supra*, pp. 15–16).

[22] Even if it cannot be said that an abandonment occurred, Garrett at least effectively surrendered possession and control of the suitcase and its contents to Mrs. Mahon by leaving the suitcase in her basement, and thus accepted the risk that she might consent to a search and seizure of the property, as pointed out by the court below (R. 85–86). See, *e.g.*, *Marshall* v. *United States*, 352 F. 2d 1013, 1014 (C.A. 9), certiorari denied, 382 U.S. 1010.

case the evidence of the stolen money, also found in the suitcase, which he must have believed the government could connect up with him. Had his motion succeeded, the testimony he gave in support thereof, as well as the suitcase and its contents, would in all likelihood have been inadmissible; otherwise, it might be thought, the thrust of the exclusionary rule would be subverted. See *Safarik* v. *United States,* 62 F. 2d. 892, 897 (C.A. 8). Garrett was confronted with a tactical decision, which required him to evaluate whether, under the circumstances, the risk accompanying his effort to recover and suppress the evidence was worth assuming.[23] Maguire, *Evidence of Guilt* 218 (1959). And his real complaint is really no more than that, as it turned out, the strategy he chose to follow operated to his disadvantage.

Our system for the administration of justice is based in large part upon the production of evidence, in which the testimony of witnesses plays a large role. The system is also based on the assumption that witnesses are responsible for what they say. It is recognized that sometimes they are not truthful, and various devices are available to test their veracity—cross-examination, the showing of prior inconsistent statements, impeachment, and so on.

But the fact remains that no one, not even a defendant in a criminal case, has any claim or right,

[23] Indeed, the court below, after noting that Garrett's "testimony was voluntary and [was] given under the guidance of his own counsel," concluded that what he in effect sought was protection "from the risks of errors of judgment in trial tactics" (R. 85).

constitutional or otherwise, to testify irresponsibly. He does have a right not to testify at all. And if he exercises that right the fact that he does not testify may not be used against him. This is what *Griffin* v. *California,* 380 U.S. 609, stands for. If, however, he chooses to testify, for any reason, he has no right to give testimony for which he is not responsible. Testimony given on a motion to suppress evidence is not given "for this date and train" only. It is a part of the process of administration of justice which presupposes that testimony is seriously and responsibly given, and is therefore reliable.

If the defendant takes affirmative action, under oath, in open court, he should be responsible for the consequences of that action. In this lies the distinction between this case and *Griffin* v. *California, supra.* In *Griffin,* the defendant did nothing. He took no action. He chose to rely on his undoubted right to refuse to testify. Then, under the system which was in effect in California, and in a few other States, the effect of his right was substantially impaired by the adverse comment which the prosecutor was free to make, and to which the judge could refer in his charge. Thus, the defendant had no clear choice. There was no way in which he could maintain his privilege not to testify without impairment. By merely remaining silent, and doing nothing, he subjected himself to consequences which, almost inevitably, took away much of the substance of the privilege.

In the present case, however, the defendant always remained free to exercise his Fifth Amendment privi-

lege against testifying. No one sought to compel him to testify, at any time, either at his trial, or before his trial. The defendant also had the unfettered right to move to suppress evidence which had been obtained by an illegal search. He remained free to support such a claim by any available evidence, including his own testimony, if he chose to give it. Whether he should testify was for him alone to decide. But he should not be heard to disclaim whatever testimony he chooses to give; that testimony, like any other testimony given under oath, in open court, was given without reservation or qualification, and it should be available for use if it becomes relevant in connection with his trial. This is simply the normal consequence of an intentional waiver of the privilege against self-incrimination.

Any defendant who takes the stand for any purpose is to a greater or lesser extent on the horns of a dilemma since anything he says may, in the same proceeding or in another context, be used against him. *Walder* v. *United States,* 347 U.S. 62; *Perlman* v. *United States,* 247 U.S. 7; *Edmonds* v. *United States,* 273 F. 2d 108 (C.A.D.C.), certiorari denied, 362 U.S. 977; *Ayres* v. *United States,* 193 F. 2d 739 (C.A. 5). Thus, in every criminal case the defendant must make a decision whether to testify in his defense and perhaps succeed only in aiding the prosecution. That risk is especially acute when he admits doing the act charged but pleads self-defense, or denies culpability

on the ground of entrapment or insanity. There, as here, it may be said that a "cruel choice" is imposed; that the defendant is often "compelled" to take the stand in order to exercise his right to establish a special defense. Yet, in none of these cases is the defendant permitted to waive his Fifth Amendment privilege only for his own advantage: his testimony, although offered in defense, is admitted for all purposes and may serve to furnish an essential link in establishing his guilt. What was said in *Raffel* v. *United States,* 271 U.S. 494, 497, 499, with respect to the defendant's exposure to cross-examination when he voluntarily becomes a witness is fully applicable here: "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will * * *. The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness."

Nor is voluntary testimony given at one hearing or trial normally inadmissible in a subsequent criminal proceeding. The Fifth Amendment does not, for instance, bar the use of a defendant's exculpatory courtroom statement at his later trial for perjury. See *United States* v. *Williams,* 341 U.S. 58. And, similarly, the defendant's evidence at a preliminary examination is admissible as an admission against interest at

his subsequent trial. *Powers* v. *United States,* 223 U.S. 303.[24]

Why, then, should the rule be different with respect to voluntary testimony given on a motion to suppress? The lower courts have seen no reason to make a special exception here. On the contrary, the law is well-settled that testimony offered by the movant at an unsuccessful hearing on his motion to suppress can be introduced in evidence as an admission against interest. Thus, in *Heller* v. *United States,* 57 F. 2d 627 (C.A. 7), certiorari denied, 286 U.S. 567, the appellant complained about the introduction at trial of testimony given by him at such a hearing, to the effect that the house searched was his residence. There the Seventh Circuit stated (57 F. 2d at 629):

> If Heller had made such a statement out of court, it undoubtedly could have been shown upon the trial, by testimony of those who heard him make it, in any undertaking by the government to show his relation to the place where the crime was charged to have been committed. We

[24] So, also, it is settled that a defendant who chooses to establish a just claim for a change of venue will not be heard to complain that to assert his right to an impartial jury trial he was compelled to waive his Sixth Amendment right to a speedy trial or to trial in the vicinage. See *United States* v. *Dennis,* 183 F. 2d 201, 226 (C.A. 2), affirmed, 341 U.S. 494; *Delaney* v. *United States;* 199 F. 2d 107, 112 (C.A. 1); *Harney* v. *United States,* 306 F. 2d 523, 532 n. 4 (C.A. 1), certiorari denied *sub nom. O'Connell* v. *United States,* 371 U.S. 911. Similarly, a defendant who voluntarily chose to make what he regarded as an exculpatory statement cannot successfully object to the admission of parts of that statement which inculpate him in some way. *E.g., Word* v. *United States,* 199 F. 2d 625 (C.A. 10), certiorari denied, 345 U.S. 936; see generally 1 Wharton, *Criminal Evidence* 661 (1955).

> cannot see why this should be less so if the statement he had made was in court and under the solemnity of an oath. He was not obliged to testify upon the motion any more than upon the trial. Had he testified at the trial denying it was his residence, the testimony he previously gave to the contrary might have been used for his impeachment. If there were a second trial of the same case, any admissions he made as a witness upon the first trial could be shown against him on the second, although on the second he did not testify.

Similarly, in *United States* v. *Taylor,* 326 F. 2d 277 (C.A. 4), certiorari denied, 377 U.S. 931, the Fourth Circuit stated (326 F. 2d at 280):

> Admissions which are * * * wholly voluntary regularly are admitted in criminal cases against defendants; indeed, they are the only admissions which are admissible against them. The fact that * * * the defendants may have been under the justifiable impression that they would be without standing to move to suppress unless they did admit ownership does not warrant the conclusion that the admission was involuntary. In all of the cases which uniformly have approved receipt in evidence of such admissions, the admissions have been made in similar efforts to establish standing to move to suppress.[25]

[25] In *Kaiser* v. *United States*, 60 F. 2d 410 (C.A. 8), certiorari denied, 287 U.S. 654, the court found a like contention "too frivolous to be discussed," since the pretrial testimony was part of "a court record, open to any one for perusal" (60 F. 2d at 413). State courts have similarly held such testimony to be admissible. *Casias* v. *People*, 415 P. 2d 344 (Colo.), certiorari denied, 385 U.S. 979; *Bell* v. *State*, 94 Tex. Cr. 266, 250 S.W. 177; *State* v. *Williams*, 69 Ohio App. 361, 41 N.E. 2d 717; *State* v. *Dersiy*, 121 Wash. 455, 209 Pac. 837.

Finally, we stress that the prevailing rule—permitting the use at trial of a defendant's testimony on a motion to suppress evidence—does not, in practice, usually confront the accused with the impossible choice suggested by petitioners. On the one hand, the decision in *Jones* v. *United States,* 362 U.S. 257, focusing on the very "dilemma" claimed here, resolved the problem for those cases in which the choice was most difficult. The requirement of standing to contest the validity of a search was there relaxed so as to permit a defendant to suppress illegally seized evidence without establishing his interest in it if proof of possession alone would incriminate him. At the other extreme are situations like that reflected by this record, in which the contention that the defendant's right of privacy was violated is essentially frivolous because he has no colorable interest in the premises searched and has effectively abandoned the property seized. In these circumstances, it is a plain overstatement to say that the defendant is put to the "cruel choice" of waiving either his Fourth Amendment right or his Fifth Amendment privilege.

There remain those cases in which special standing must be shown and the claim for suppression is substantial—albeit it ultimately fails. Often, the defendant will be able to establish a sufficient interest in the premises searched without himself testifying. In many other cases, his testimony will not incriminate him. No doubt there will be situations in which the accused must make a close decision. But that is an unavoidable aspect of our adversary system in which the defendant is left free to chart his own course. We submit that the

voluntary choice to testify in support of a motion to suppress should carry the same consequence here as elsewhere—that what is said, if relevant to the question of guilt, may be put before the jury as competent evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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